# Public Prosecutor v Jiva a/l Gopal Krishnan

HIGH COURT (PULAU PINANG) — CRIMINAL TRIAL NO 45–97 OF 2008
MOHD AMIN FIRDAUS JC
26 MAY 2010

*Criminal Law — Dangerous drugs — Trafficking — Agreement to sell cannabis — Agent provocateur — Whether evidence of agent provocateur admissible — Whether evidence of agent provocateur required corroboration — Whether accused knew contents of bag he was carrying — Whether presumption of trafficking proved — Whether accused innocent carrier — Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a)*

Upon receiving information from a registered informer about an active drug trafficking syndicate, ASP Rosli bin Ismail, the chief investigating officer in this case, ('the CI') held a briefing session with his police personnel about an operation to be undertaken together with the Narcotics Department in Alor Star, Kedah. The CI assigned L/Cpl Abdul Razak bin Long ('AP1') and L/Cpl Mohd Basri bin Mat Nor ('AP2') to act as agent provocateurs in this sting operation. The operation involved AP1 and AP2 being introduced by the informer to a drug trafficking syndicate dealing in cannabis, which was active in the Seberang Perai area in Penang. On 27 June 2007 at about 10.30pm, the informer contacted AP1 to inform him that a meeting had been set up with a member of the drug trafficking syndicate at a particular grilled fish restaurant in Seberang Jaya, Penang. When AP1 and AP2 arrived at the restaurant, the informer introduced them to the accused. AP1 and the accused then started negotiations for the purchase of the drug cannabis, while AP2, the informer and another Malay man talked among themselves. The accused left the restaurant after informing AP1 that he would keep in touch about where and when he would deliver the cannabis. AP1 kept the CI informed about the outcome of the meeting between himself, AP2 and the accused. Thereafter on 28 June 2007 at about 1.40am, the accused contacted AP1 and asked him to meet him at the Sungai Dua Toll Plaza. At the toll plaza, the accused directed AP1 to follow his car to another area to collect the cannabis. The CI who had been kept informed of the latest developments was observing what transpired between the agent provocateurs and the accused at the Sungai Toll Plaza from a departmental car parked nearby. AP1 then followed the accused's car to Jalan Mengkuang when the latter further directed AP1 to drive forward towards a junction and then U-turn back to where he came from with the assurance that the drugs would be ready for collection by then. The CI who was tailing the accused and the agent provocateurs in a departmental car observed the goings on. When AP1's car arrived back at the same place he saw the accused standing

beside the road holding a bag in his right hand. When AP1 stopped the car AP2 alighted from the car and walked toward the accused. When the accused got closer, AP2 shouted 'kami polis', at which point the accused dropped the bag he was holding and tried to escape. A struggle ensued between the accused, the agent provocateurs and other police personnel but finally the accused was arrested. The bag which the accused was carrying but which he dropped in the struggle was opened by the CI and found to contain five compressed slabs which were later confirmed by the chemist to be 9,129g of cannabis. The accused was accordingly charged with trafficking in 9,129g of cannabis, under s 39B(1)(a) of the Dangerous Drugs Act 1952(the Act). The prosecution case that the accused was trafficking was based on the direct evidence of AP1 supported by the CI, the complainant of the case. At the close of the prosecution case the defence submitted that the prosecution had failed to prove a prima facie case against the accused. It was the defence contention that AP1's evidence was not supported by any of the prosecution witnesses and that the CI could not corroborate AP1's evidence since the CI's evidence was based on information given by AP1; that AP1's evidence could not be relied upon since AP2 was not called upon to give evidence and corroborate AP1's evidence; and that the accused's arrest was manipulated just to fulfill the arrest quota of the police. The prosecution replied that the evidence of an agent provocateur was admissible and did not require corroboration and that AP2 was not called as a witness because he did not play a major role. Since the court was of the view that the prosecution had succeeded in making out a prima facie case, the accused was asked to enter his defence. In his defence the accused tried to suggest that he was a mere pawn manipulated by the informer on the directive of the police to commit the offence. The core of the argument for the defence was that the accused was an innocent or passive carrier of the bag which contained the cannabis, in that, he had accompanied a friend named 'Panda' to meet another friend at Sungai Dua and Mengkuang Road and that he was asked by 'Panda' to hand the bag over to Panda's friend when he was arrested.

**Held**, convicting the accused and sentencing him to death:

(1) From the direct evidence of the CI, AP1 and AP2 that the accused was seen carrying the bag containing the cannabis along Jalan Mengkuang, it was clear that the accused had custody, control and thus possession of the contents of the bag. When the accused realised that AP1 and AP2 were police officers he dropped the bag he was carrying and then resisted arrest by putting up a struggle. This went to show that the accused had knowledge of the cannabis he was supposed to sell to the agent provocateurs. His discussion with AP1 on the subject matter of cannabis also reflected his knowledge of the contents of the bag. Since the amount of cannabis exceeded the statutory limit the presumption of trafficking under s 37(da) of the Act arose. He was thus found to have trafficked in the drugs in this case and hence a prima facie case was established against

him. The issue that the accused's fingerprints were not on the bag was not fatal to the prosecution case as there was sufficient evidence on the identity of the accused as the drug trafficker, in that, at all material times he was seen to be carrying the bag containing the cannabis. Based on the facts of the case the accused was in mens rea possession of the cannabis (see paras 110–114 & 133).

(2) In the present case the defence did not lead any evidence to show that AP1 was unworthy of credit apart from claiming that the arrest of the accused was merely to fulfill the arrest quota of the police. Any statement made by the accused to an agent provocateur was admissible at the trial and such evidence was not required to be corroborated. The accused had engaged in a discussion on the drug transaction and the court had no reason to doubt the credibility of AP1 that the accused was a drug trafficker of his own accord. AP2 was not called as a witness because he did not play an active role in the operation. However, he was made available to the defence and they chose not to call him as a witness. Thus s 114(g) of the Evidence Act 1950 was not applicable to this case (see paras 119–122 & 129).

(3) There was no reason to doubt the credibility of the complainant of the case, ie the CI. The CI did not make any contradictory evidence that affected the prosecution case in regard to the two purported versions in his evidence as contended by the defence (see paras 129–130).

(4) The accused's defence did not cast a reasonable doubt on the prosecution case. A noteworthy point is why Panda required the accused's services to just hand over the bag to his friend when Panda could himself have done it. Further the present case did not fit into any of the probable situations in which a person is likely to be regarded as an innocent or passive carrier. The accused also did not adduce any evidence to show that Panda (assuming that he exists) possessed an ulterior motive to get him arrested, when both of them were friends and knew each other for six years (see paras 170, 176, 179 & 183).

**[Bahasa Malaysia summary**

Setelah menerima maklumat daripada pemberi maklumat berdaftar tentang sindiket pengedaran dadah yang aktif, ASP Rosli bin Ismail, Ketua Pegawai Penyiasat dalam kes ini ('KP') telah mengadakan sesi taklimat dengan penjawat polisnya tentang operasi yang akan dijalankan bersama Jabatan Narkotik di Alor Star, Kedah. KP telah melantik C/Kpl Abdul Razak bin Long ('AP1') dan L/Kpl Mohd Basri bin Mat Nor ('AP2') untuk bertindak sebagai ejen perangkap dalam operasi ini. Operasi ini melibatkan AP1 dan AP2 diperkenalkan oleh pemberi maklumat kepada sindiket pengedaran dadah yang mengendalikan kanabis, yang giat di kawasan Seberang Perai, Pulau Pinang. Pada 27 Jun 2007 lebih kurang pukul 10.30 malam, pemberi

maklumat telah menghubungi AP1 untuk memberitahunya bahawa satu mesyuarat telah diadakan dengan seorang ahli sindiket pengedaran dadah di restoran ikan bakar di Seberang Jaya, Pulau Pinang. Apabila AP1 dan AP2 tiba di restoran, pemberi maklumat itu memperkenalkan mereka kepada tertuduh. AP1 dan tertuduh kemudian mula berunding untuk belian dadah kanabis, manakala AP2, pemberi maklumat dan seorang lelaki Melayu lain bercakap-cakap antara mereka. Tertuduh telah meninggalkan restoran itu setelah memberitahu AP1 bahawa dia akan berhubungan tentang di mana dan bila dia akan menyerahkan kanabis itu. AP1 telah memaklumkan KP tentang keputusan mesyuarat antara dirinya, AP2 dan tertuduh. Selepas itu 28 Jun 2007 lebih kurang 1.40 pagi, tertuduh telah memberitahu AP1 dan memintanya untuk berjumpanya di Plaza Tol Sungai Dua. Di plaza tol itu, tertuduh mengarahkan AP1 mengikuti keretanya ke kawasan lain untuk mengambil kanabis itu. KP yang telah dimaklumkan tentang perkembangan terkini telah memerhatikan apa yang berlaku antara ejen-ejen perangkap itu dan tertuduh di Plaza Tol Sungai Dua daripada sebuah kereta jabatan yang diparkirkan berhampiran. AP1 kemudian telah mengikuti kereta tertuduh ke Jalan Mengkuang apabila tertuduh seterusnya mengarahkan AP1 memandu ke hadapan ke arah satu persimpangan dan kemudian membuat pusingan U kembali ke tempat dia datang dengan jaminan bahawa dadah itu akan sedia untuk diambil oleh mereka. KP yang mengekori tertuduh dan ejen-ejen perangkap dalam kereta jabatan telah memerhatikan apa yang berlaku. Apabila kereta AP1 sampai balik ke tempat sama dia melihat tertuduh berdiri di tepi jalan memegang beg di tangan kanannya. Apabila AP1 memberhentikan kereta AP2 telah keluar dari kereta itu dan berjalan ke arah tertuduh. Apabila tertuduh semakin hampir, AP2 menjerit, 'Kami Polis', yang mana pada saat itu tertuduh telah menjatuhkan beg yang dipegangnya dan cuba melarikan diri. Pergelutan telah berlaku antara tertuduh, ejen-ejen perangkap itu dan penjawat polis lain tetapi akhirnya tertuduh telah ditangkap. Beg yang dibawa tertuduh tetapi yang telah dijatuhkannya dalam pergelutan itu telah dibuka oleh KP itu dan didapati mengandungi lima keping mampat yang kemudian disahkan oleh ahli kimia sebagai kanabis seberat 9,129g. Tertuduh sewajarnya telah dituduh kerana mengedar 9,129g kanabis, di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Kes pendakwaan bahawa tertuduh mengedar adalah berdasarkan keterangan langsung AP1 yang disokong oleh KP, pengadu kes tersebut. Di penutup kes pendakwaan, pembelaan telah berhujah bahawa pendakwaan telah gagal membuktikan kes prima facie terhadap tertuduh. Pembelaan berpendapat bahawa keterangan AP1 tidak disokong oleh mana-mana saksi-saksi pendakwaan dan bahawa KP tidak boleh menyokong keterangan AP1 memandangkan keterangan KP berdasarkan maklumat yang telah diberikan oleh AP1; bahawa keterangan AP1 tidak boleh digunakan memandangkan AP2 tidak dipanggil untuk memberi keterangan dan menyokong keterangan AP1; dan bahawa tangkapan tertuduh telah dimanipulasikan hanya untuk memenuhi kuota tangkapan polis. Pendakwaan menjawab bahawa keterangan ejen perangkap boleh diterima dan tidak perlu

disokong dan bahawa AP2 tidak dipanggil sebagai saksi kerana dia tidak memainkan peranan utama. Oleh kerana mahkamah berpendapat bahawa pendakwaan telah berjaya membuktikan kes prima facie, tertuduh diminta memasukkan pembelaannya. Dalam pembelaannya tertuduh telah cuba memberi cadangan yang dia hanya menjadi alat yang dimanipulasikan oleh pemberi maklumat atas arahan polis untuk melakukan kesalahan itu. Teras hujahan pembelaan adalah bahawa tertuduh merupakan pembawa beg yang mengandungi kanabis tidak bersalah atau pasif, yang mana, dia telah menemani kawan bernama 'Panda' untuk berjumpa dengan kawan lain di Sungai Dua dan Jalan Mengkuang dan bahawa dia telah diminta oleh 'Panda' untuk menyerahkan beg itu kepada kawan Panda semasa dia ditangkap.

**Diputuskan**, mensabitkan tertuduh dan menjatuhkan hukuman mati ke atasnya:

(1) Berdasarkan keterangan langsung KP, AP1 dan AP2 bahawa tertuduh dilihat membawa beg mengandungi kanabis sepanjang Jalan Mengkuang, ia adalah jelas bahawa tertuduh mempunyai jagaan, kawalan dan dengan itu milikan kandungan beg itu. Apabila tertuduh menyedari bahawa AP1 dan AP2 adalah pegawai polis dia telah menjatuhkan beg yang dibawanya dan kemudian cuba mengelak tangkapan dengan memulakan pergelutan. Ini menunjukkan bahawa tertuduh mempunyai pengetahuan tentang kanabis yang sepatutnya dijualnya kepada ejen-ejen perangkap itu. Perbincangan dia dengan AP1 tentang perkara kanabis tersebut juga menggambarkan pengetahuannya tentang kandungan beg itu. Memandangkan jumlah kanabis melampaui had statutori andaian pengedaran di bawah s 37(da) Akta timbul. Dia dengan itu didapati mengedar dadah dalam kes ini dan justeru itu kes prima facie telah dibuktikan terhadapnya. Isu bahawa cap jari tertuduh tiada pada beg itu tidak memudaratkan kes pendakwaan kerana terdapat keterangan mencukupi tentang identiti tertuduh sebagai pengedar dadah, yang mana, pada setiap masa matan dia telah dilihat membawa beg mengandungi kanabis itu. Berdasarkan fakta kes tertuduh mempunyai mens rea milikan kanabis tersebut (lihat perenggan 110–114 & 133).

(2) Dalam kes ini pembelaan tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa AP1 tidak boleh dipercayai selain daripada mendakwa bahawa tangkapan tertuduh hanya untuk memenuhi kuota tangkapan polis. Apa-apa kenyataan yang dibuat oleh tertuduh kepada ejen perangkap boleh diterima dalam perbicaraan dan keterangan sebegini tidak perlu disokong. Tertuduh telah mengadakan perbincangan tentang transaksi dadah dan mahkamah tiada alasan meragui kebolehpercayaan AP1 bahawa tertuduh merupakan pengedar dadah dengan kerelaannya. AP2 tidak dipanggil sebagai saksi kerana dia tidak memainkan peranan aktif dalam operasi itu. Namun begitu, dia

sedia ada untuk pembelaan dan mereka telah memilih untuk tidak memanggilnya sebagai saksi. Oleh itu s 114(g) Akta Keterangan 1950 tidak terpakai dalam kes ini (lihat perenggan 119–122 & 129).

(3) Tiada sebab untuk meragui kebolehpercayaan pengadu kes, iaitu KP. KP tidak membuat apa-apa keterangan bercanggah yang menjejaskan kes pendakwaan berkaitan dua versi yang dimaksudkan dalam keterangannya sepertimana ditegaskan oleh pendakwaan (lihat perenggan 129–130).

(4) Pembelaan tertuduh tidak menimbulkan keraguan munasabah ke atas kes pendakwaan. Satu perkara yang patut diberi perhatian adalah kenapa Panda memerlukan khidmat tertuduh untuk hanya menyerahkan beg itu kepada kawannya apabila Panda sendiri boleh melakukannya. Bahkan kes ini tidak padan dengan mana-mana keadaan berkemungkinan yang mana seseorang itu mungkin dianggap sebagai pembawa yang tidak bersalah atau pasif. Tertuduh juga tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa Panda (dengan andaian dia wujud) memiliki motif tersembunyi agar dia ditangkap, apabila kedua-dua mereka merupakan kawan dan mengenali satu sama lain lebih dari enam tahun (lihat perenggan 170, 176, 179 & 183).]

**Notes**

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

**Cases referred to**

*Balachandran v PP* [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
*Gunalan a/l Ramachandran & 2 Ors v PP* [2004] 4 MLJ 489; [2004] 1 LNS 318, CA (refd)
*Herchun Singh & Ors v PP* [1969] 2 MLJ 209, FC (refd)
*Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65, CA (refd)
*Muthusamy v PP* [1948] MLJ 57 (refd)
*(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v PP* [1987] 2 MLJ 336, SC (refd)
*Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)
*PP v Hla Win* [1995] 2 SLR 424, CA (refd)
*PP v Lee Yau Ket* [2008] 4 MLJ 223; [2008] 1 LNS 172, HC (refd)
*PP v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (refd)
*PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
*Saad Ibrahim v PP* [1968] 1 MLJ 158, HC (refd)
*Ti Chuee Hiang v PP* [1995] 2 MLJ 433, SC (refd)
*Toh Ah Loh & Mak Thim v Rex* [1949] MLJ 54 (refd)

*Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 2 AMR 834, FC (refd)
*Wan Yuriilhami bin Wan Yaakob lwn PR dan satu lagi rayuan* [2009] 2 MLJ 383, CA (refd)

**Legislation referred to**

Criminal Procedure Code ss 180(1), 277
Dangerous Drugs Act 1952 ss 2, 39B(1)(a), 40, 40A(1)
Evidence Act 1950 s 114(g)

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**Mohd Amin Firdaus JC:**

**[1]** The accused named Jiva a/l Gopal Krishnan was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234):

> Bahawa kamu pada 28hb Jun 2007, jam lebih kurang 3.05 pagi, di Jalan Mengkuang, Butterworth, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu 9129 gram Cannabis dan dengan itu, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

FACTS OF THE CASE

**[2]** ASP (G 9421) Rosli bin Ismail ('PW4') testified that on 27 June 2007 at about 10am he received information from a registered informer about an active drug trafficking syndicate and at about 2pm on the same day, he held a briefing with about twenty one police personnel including officers and the rank and file on the proposed operation to be taken at the operation room in the Narcotic Department at the Police Headquarters Contingent in Alor Setar, Kedah.

**[3]** During the briefing, he allocated duty as agent provocateur to two police personnel that is R/F 65362 L/Cpl Abd Razak bin Long ('PW6') (AP1) and D/Cpl 116138 Mohd Basri bin Mat Nor (AP2). For the rest of the officers and the rank and file, he divided them into various groups using departmental vehicles and motorcycles.

**[4]** After the briefing session ended, PW4 directed the two agent provocateurs to proceed to Seberang Jaya in Penang by using departmental car No KBP 8890 model Gen 2. After both the agent provocateurs left for Seberang Jaya, the rest of the team members including the complainant PW4, waited in the office of the Narcotic Department for further development. They were to communicate with each other by hand phone.

**[5]** Later at about 4.30pm on the same day, PW4 received a telephone call informing him about the development of the situation. After receiving the telephone call, at about 5pm, ASP Rosli bin Ismail (PW4) and the rest of the team members then proceeded to Seberang Jaya and on reaching there, they loitered in the compound of the Seberang Jaya Hospital there.

**[6]** At the hospital compound in Seberang Jaya, PW6 telephoned PW4 informing him that the targeted drug trafficker wished to make an appointment to meet PW6 at 11pm the same day that is 27 June 2007 at a grilled fish restaurant beside the Butterworth-Kulim Expressway.

**[7]** After receiving this telephone call from the agent provocateur L/Cpl Abd Razak bin Long (PW6), PW4 arranged an operation team to make observation when PW6 met up with the target at the said restaurant later at night.

**[8]** When PW4 and his team members arrived at the grilled fish restaurant to make observation, PW4 saw a Malay man, an Indian man and the informer waiting for the arrival of the two agent provocateurs. The Indian man is the accused whom PW4 subsequently identified. They observed from a distance within sight outside the restaurant and their presence was not noticeable by people in the restaurant. PW4 said that at about 11pm late that night, there were not many people in the restaurant.

**[9]** When PW6 reached the restaurant, he alighted from the car and straightaway walked to where the informer and the accused were waiting and later followed by the other agent provocateur D/Cpl Mohd Basri bin Mat Nor (AP2). PW4 testified that he observed a discussion taking place between the accused and PW6, the agent provocateur, for about 45 minutes. The presence of the informer and one Malay man at the scene were mainly to hear the discussion and conversation between the accused and PW6.

**[10]** PW4 could clearly see all their faces as the grilled fish restaurant was well lit. He could remember the face of the accused. After carrying out the observation, PW4 and the rest of the team members returned to the Seberang Jaya Hospital where they waited there.

**[11]** After that PW4 was informed by PW6 that the accused named Jiva and the Malay man was a friend of the informer. The presence of this Malay man was only to accompany the informer because the latter was not good at driving a car.

**[12]** Next PW6 informed PW4 that during the discussion, the accused Jiva told him that he only could supply ten slabs of cannabis although he asked for 30 slabs. PW6 told PW4 that the accused would make an effort to obtain at least ten slabs of cannabis so that PW6 would not go home empty-handed.

**[13]** Subsequently on 28 June 2007 at about 2am PW4 was again informed by PW6 that the accused requested both the agent provocateurs that is, PW6 himself and D/Cpl Mohd Basri (AP2) to meet him up at the Sungai Dua Toll Plaza. The telephone call was only to tell PW to go to the said Toll Plaza to meet the accused.

**[14]** At the Sungai Dua Toll Plaza, the meeting between the accused and the agent provocateurs did not last long when the accused retreated from that place and proceeded to an area along Jalan Mengkuang in Butterworth.

**[15]** According to PW4, at the Sungai Dua Toll Plaza, he could see the movement of the accused and PW6 because that area was lit up by lights. L/Cpl Mohd Basri (AP2)was seen to sit behind the wheel all the time. Traffic was also not heavy as it was then 2am in the early hours of the morning.

**[16]** Later he saw PW6 immediately left the toll plaza area and followed the car of the accused. The accused sat in a Perodua Kancil car driven by the Malay man, a friend to the informer.

**[17]** After what had happened at the Sungai Dua Toll Plaza, PW6 once again called PW4 to tell him that the accused would be delivering the supply of cannabis at the Jalan Mengkuang area in Butterworth, Penang.

**[18]** Instantly PW4 and his operation team tailed both the accused's and the agent provocateurs' cars (SP6) and D/ Cpl 116138 Mohd Basri bin Mat Nor until they reached the Jalan Mengkuang area in Butterworth. PW4 felt that the accused was not aware that the car he was in was being followed by police vehicles.

**[19]** When they reached Jalan Mengkuang, PW4 observed that the accused got out from the car which had stopped by the roadside and he entered a lane lined by houses. The car of PW4 stopped about 20–30m away from the location of the particular lane where PW4 could observe the movement of the

accused. There were no obstacles between the lane and the position of PW4's car to block his view. Moreover the surrounding area was bright as there were street lamps.

**[20]** PW4 saw the car of the agent provocateurs followed the Kancil car where the accused had alighted. The Kancil car only stopped for a while beside the lane and then moved towards the junction of Jalan Mengkuang and stopped there facing Jalan Bagan Luar. P4's car also went towards the same junction but facing Jalan Raja Uda followed by the agent provocateurs' car.

**[21]** PW4 said that at the said road junction, he directed D/Cpl 121702 Roslan bin Mansor to go into the agent provocateurs' car and hid there. D/Cpl Roslan hid inside the car without the accused knowing it. The presence of D/Cpl Roslan was to render help to the two agent provocateurs when the situation warranted it. After D/Cpl Roslan got inside the car, it made a U-turn and headed back towards the location of the lane where the accused had walked into it. It stopped near the lane. At that point in time, L/Cpl Abd Razak bin Long (PW6) (AP1) was driving the Gen 2 and D/Cpl Basri (AP2) was sitting beside him.

**[22]** PW 4's car also made a U-turn and headed towards the same direction but did not stop at the lane where the accused alighted from the Kancil car. It made another U-turn at the road junction at Jalan Kampong Paya and stopped across the road nearby where the lane was located across the road.

**[23]** Soon after that, PW4 saw the accused walking out from the lane heading towards the car of the agent provocateurs. At the same time, he noticed that the accused was holding one bag (P8) in his right hand and walking hurriedly towards the Gen 2 car. At that time, the front passenger door of the Gen 2 was open.

**[24]** At that moment D/Cpl Mohd Basri (AP2) was waiting near the Gen 2 car and when the accused approached the car, PW4 saw D/Cpl Mohd Basri (AP2) all of a sudden grabbed the accused and heard shouting from AP2 'Police!'

**[25]** PW4 then saw AP2 struggling with the accused and the bag that the accused was holding slipped from his hand and dropped to the ground.

**[26]** D/Cpl Roslan came out from his hiding place inside the Gen 2 car and went to the aid of AP2 in trying to arrest the accused. The three of them struggled until all of them fell into a big drain.

**[27]** At this juncture, PW4 and other members of the team rushed to the scene of the struggle to give help. Nonetheless, PW4 saw that eventually the accused was subdued and at that moment PW4 noticed that the accused looked frightened and his clothes were wet.

**[28]** Following this, PW4 searched the area near the car of the agent provocateurs and found a bag on the road similar to the bag that he had earlier on saw the accused carrying it. He saw the words 'New York Yankees' emblazoned on the bag.

**[29]** PW4 then opened the bag witnessed by the accused, the two agent provocateurs and other members of the police team. Inside the bag, he discovered two packages. When he opened one white paper package, he saw five slabs suspected to contain cannabis and the other package also contained five slabs suspected to be cannabis too. Altogether there were ten slabs.

**[30]** After arresting the accused, PW4 took the accused and the seized exhibits back to Ibu Pejabat Polis Daerah, Seberang Perai in Penang to lodge a police report (P10). Meanwhile, the two agent provocateurs then left the raiding team. When he reached the police station, PW4 prepared a search list and marked the exhibits by putting down his signature and the date of the arrest.

**[31]** Five packages found in the bag were wrapped up in aluminium foil and transparent sello-tape (salotape lutsinar) respectively and the other five packages were wrapped in white paper and transparent sello-tape.

**[32]** The agent provocateur R/F 65362 L/Cpl Abd Razak bin Long (PW6) (AP1) testified that on 27 June 2007 at about 2pm he and other police personnel, officers and the rank and file, attended a briefing session given by ASP Rosli Ismail (PW4) on an operation to be carried out in connection with this case at the Narcotic Department at the Police Headquarters in Alor Star, Kedah. PW4 assigned him and L/Cpl Mohd Basri bin Mat Nor the duty to act as undercover agents (meaning agent provocateurs) to be introduced by the registered informer to a drug trafficking syndicate dealing in cannabis which was active in the Seberang Perai area in Penang.

**[33]** PW6 narrated that on 27 June 2007 at about 2.30pm he and D/Cpl Mohd Basri left for Butterworth by a departmental car No KBP 8890 model Gen 2. On arrival there, they both waited for the telephone call from the informer. At about 10.30pm on the same day, the informer contacted PW6 telling him that he and the target that is one Indian man, the accused, would be at a grilled fish restaurant area located beside the Butterworth-Kulim Highway in Seberang Jaya, Penang.

**[34]** After receiving the telephone call, PW6 requested the informer to wait for him at the grilled fish restaurant until he arrived. PW6 then informed PW4 on the prearranged meeting with the informer and the accused at the said restaurant. After that, he told the informer on the telephone 'Tunggu saya, saya akan sampai'.

**[35]** Subsequently, approximately at 11pm, PW6 reached the restaurant in Seberang Jaya and when he came out from the car, he was received by the informer who introduced him to the accused. PW6 greeted the accused and introduced himself as 'Uncle'. The accused introduced himself as 'Jiva'.

**[36]** While at the grilled fish restaurant, the accused asked PW6:

Okay, uncle nak barang, berapa banyak?

**[37]** According to PW6, 'barang' is understood among the drug sellers and buyers to mean a compressed slab weighing approximately to be 1kg.

**[38]** PW6 then replied to the accused:

Boleh kah uncle minta 30 biji?

**[39]** PW6 meant 1kg/1000g for '1 biji'.

**[40]** PW6 asked the accused:

Berapa harga you boleh kasi?

**[41]** The accused answered:

Nanti sat, saya call towkay.

**[42]** After the accused made a telephone call, he told PW6 that the towkay said:

Banyak barang boleh ambil tapi kita takut ada duri.

**[43]** PW6 said that 'duri' meaning that he (seller) would be entrapped.

**[44]** After that the accused told PW6 that the towkay said:

Kalau depa (meaning PW6) nak ambil, kita bagi dulu 10 biji.

**[45]** The accused also said that the towkay said:

Kalau line clear, depa minta banyak mana barang, kita akan bagi depa.

**[46]** The accused also mentioned that the towkay said:

Harga setiap satu biji dadah mampat berharga RM1,550.00.

**[47]** This price was fixed by the accused. The accused only made one telephone call to the towkay.

**[48]** After mentioning the price, PW6 told the accused:

Okay lah, you cakap macam itu.

**[49]** PW6 meant that he accepted the ten 'biji ganja' at the price asked.

**[50]** The accused then asked PW6 and AP2 to wait at the restaurant area. The discussion took place for about 45 minutes. Throughout the period of discussion, L/Cpl Mohd Basri (AP2), the informer and one Malay man were with PW6. The Malay man is a close friend of the informer and helped him in this operation. The Malay man can also said to be an informer himself.

**[51]** PW6 testified that at that time, the restaurant was not busy and throughout the ongoing discussion on the drug deal transaction between himself and the accused, the informer, the Malay man and AP2 kept quiet. The three of them only talked among themselves.

**[52]** After that, the accused, the informer and the Malay man left the grilled fish restaurant and before leaving, the accused asked PW6 and AP2 to wait at the restaurant.

**[53]** After the accused left the restaurant at about 11.50pm on 27 June 2007, PW6 telephoned PW4 and told him that the 30 compressed slabs of cannabis that he wanted could not be fulfilled and that instead he would only be supplied with ten slabs.

**[54]** On 28 June 2007 at about 12.40am the accused returned to the vicinity of the restaurant where PW6 was waiting and the accused told him:

Line tak clear, ada road block police dekat rumah towkay.

**[55]** PW6 asked:

Berapa jam aku menunggu?

**[56]** The accused told him:

Sehingga road block selesai.

**[57]** PW6 asked:

Berapa lama?

**[58]** The accused replied:

Lebih kurang jam 2.00 pagi mungkin selesai. La ni uncle pi mana-mana dulu, selepas line ini clear, saya akan hubungi uncle balik.

**[59]** PW6 said:

Tak apa, you cakap macam ini.

**[60]** On 28 June 2007 around 1.40am, the accused contacted PW6 and informed him that he was at the Sungai Dua Toll Plaza. PW6 asked him:

Dekat Toll Sungai Dua, you duduk dekat mana?

**[61]** The accused answered:

Saya lepas Tol Sungai Dua, duduk tepi lebuh raya, menghala ke selatan.

**[62]** After the information given, PW6 headed towards the Sungai Dua Toll Plaza and arrived there approximately 2am. When he came out from the car, the accused said to him:

Uncle ambil 10 biji dulu, bukan uncle nak balik tangan kosong. Lepas itu, uncle siap wang, harga barang yang kita janji. La ni, uncle ikut kereta saya.

**[63]** PW6 saw the friend of the informer whom he met earlier on at the grilled fish restaurant driving the Kancil car which the accused was in. He asked the accused:

Tempat yang nak ambil barang ini, jauh atau dekat?

**[64]** The accused replied:

Tak jauh uncle, uncle ikut saya saja, barang dah siap, Cuma tunggu uncle ambil saja.

**[65]** PW6 said:

Okay, aku ikut hang.

**[66]** PW6 then took over the driving of the Gen 2 model car from AP2 and followed the car which the accused got into. He also informed PW4 about the development and told him the possibility that the cannabis would be handed over at Jalan Mengkuang in Butterworth.

**[67]** PW6 followed the car which the accused sat and when they reached Jalan Mengkuang around 2.50am the same day, that is 28 June 2007, he saw the Kancil car stopped in front of a house No 37A located on the same road.

**[68]** The accused came out from the Kancil car and told PW6:

Uncle, pergi ke depan, jalan ke depan, ada simpang tiga, uncle pusing balik, barang sudah siap.

**[69]** Next PW6 saw a departmental car carrying PW4 heading towards the junction mentioned by the accused and he followed it. When PW6 arrived at the junction and while in the midst of making a U-turn back to where he came from, he saw L/Cpl Roslan bin Mansor got out from the car where PW4 was in and went into his car and hid behind in the rear passenger seat. L/Cpl Roslan presence in PW6's car was to render help to both the agent provocateurs in arresting the accused.

**[70]** As PW6 was making the U-turn to go back to the place where the accused alighted from the Kancil car, he saw that the car of PW4 was also making the U-turn and going towards the same direction.

**[71]** On reaching back the same place and stopping his car, PW6 saw the car of SP4 in front of his car on the right side of the road. PW6 saw the accused standing beside the road at the entrance of the lane where he had earlier walked into it holding a bag in his right hand.

**[72]** Before stopping his car, he told AP2, 'Sat lagi aku berhenti di depan OKT sikit, hang turun, hang heret dia, bawa ke kereta kita'. After stopping the car, AP2 came out from the car and left the front passenger door opened. PW6 saw the accused walking towards the car still holding the bag while AP2 walked towards him.

**[73]** When AP2 and the accused were near the Gen 2 car of the agent provocateurs, AP2 shouted loudly 'Kami polis!' and the bag that the accused was holding dropped to the side of the road. At this point in time, L/Cpl got out from the Gen 2 car to assist AP2.

**[74]** A struggle then ensued between AP2 and the accused and PW6 and L/Cpl Roslan rushed to help AP2 to arrest the accused. PW6 saw AP2, L/Cpl Roslan together with the accused fell into a drain. The arrest of the accused was aided by D/Sgt Ahmad bin Awang who handcuffed the accused but PW6 did not know where he came from. Soon after the accused was arrested, PW4 and the rest of the raiding team also came to the scene.

**[75]** PW4 asked PW6 'Ada barang?' and the latter answered inside the bag. The bag fell to the road beside the front passenger side of the Gen 2. At that time this passenger door was open. After the arrest, the bag was still at the original place where it dropped from the hand of the accused. PW4 opened the bag and saw compressed slabs inside suspected to be cannabis. The accused was guarded by L/Cpl Roslan and D/Sgt Ahmad bin Awang and was standing near PW4 when he opened the bag. Other members of the operation team were also hanging around nearby.

**[76]** Eventually, PW6 and AP2 left the scene of the commission of the crime and returned to Alor Setar by the Gen 2 car.

PROSECUTION CASE

**[77]** Scanning from the facts of the case, it is undeniable that L/Cpl Abd Razak bin Long was the protagonist in this case and the complainant of the case G9421 Rosli bin Ismail (PW4) was the main supporting actor. The substance of the prosecution case revolved around these two characters.

**[78]** The rest of the witnesses like the police photographers Cpl 109244 Muhamad Fauzee bin Ibrahim (PW1), Cpl 98725 Yaakob Husin (PW2), the store keeper Cpl Shariff @ Baba bin Ahmad (PW3) and the investigating officer C/l Yusof bin Zainuddin (PW5) are more or less formal witnesses. Basically the role of the store keeper and the investigating officer were to ensure the safe movement of the exhibits and their safe custody until the day they were produced in court for the trial. In this case, there was nothing extraordinary for the investigating officer (PW5) to investigate further.

**[79]** The chemist, the late Rosni bt Hamid had analysed the ten compressed slabs of plant material and confirmed that all the slabs contained cannabis and

the total weight of the cannabis to be 9129g. The chemist report which was dated 17 August 2007 with No Makmal (PP) FOR 2986/07–0 (P17) is now referred.

**[80]** The prosecution case centred around the star witness, the agent provocateur (PW6) supported by the complainant of the case PW4 as substantially depicted in the facts of the case seen above. To avoid awkward repetition, the court will not delve into the rest of the facts of the case.

**[81]** After PW6 had finished giving evidence, the prosecution closed its case and offered 19 witnesses for the defence:

(a) D/Kpl 116138 Basri bin Mat Nor (Agent Provocateur)
(b) L/Kpl 104215 Ho Kwee Wee (Anggota Serbuan)
(c) D/Sjn 71285 Suhaimi bin Musa (Anggota Serbuan)
(d) D/Sjn 96216 Zahari bin Zakaria (Anggota Serbuan)
(e) D/SI 69535 Muslim bin Elias (Anggota Serbuan)
(f) D/SM 84849 Wan Zain bin Wan (Anggota Serbuan)
(g) D/Sjn 71197 Ahmad bin Awang (Anggota Serbuan)
(h) D/Sjn 69385 Azami bin Bakar (Anggota Serbuan)
(i) D/SM 71353 Anuar bin Hj Salleh (Anggota Serbuan)
(j) D/SM 88968 Mat Sedi bin Salleh (Anggota Serbuan)
(k) D/SM 104229 Raja a/l Ramasamy (Anggota Serbuan)
(l) D/Kpl 118794 Johari bin Othman (Anggota Serbuan)
(m) D/Kpl 99148 Raja a/l Tanggaraju (Anggota Serbuan)
(n) D/Kpl 121702 Roslan bin Mansor (Anggota Serbuan)
(o) L/Kpl 102668 Sontar a/l Krishnan (Anggota Serbuan)
(p) D/Sjn 69525 Yusof bin Din (Anggota Serbuan)
(q) D/Kpl/W 105551 Zaini bin Derani (Anggota Serbuan)
(r) Insp Emma Haslydiana (Anggota Serbuan)
(s) Kpl Wahab (Cawangan cap jari)

SUBMISSIONS

*Defence*

**[82]** The learned defence counsel submitted that the prosecution had failed

to prove a prima facie case against the accused. He referred to the Court of Appeal case in *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 where the Federal Court held that an agent provocateur is to be treated like an ordinary witness and whether his evidence needs to be corroborated.

**[83]** He argued that the evidence of the agent provocateur (PW6) was not supported by any of the prosecution witnesses. PW4 could not corroborate the evidence of PW6 because the former gave evidence based on the information given by PW6.

**[84]** L/Cpl Mohd Basri bin Mat Nor, the other agent provocateur was not called to corroborate the evidence of PW6. Thus the evidence of PW6 could not be relied upon, and s 114(g) of the Evidence Act 1950 should be invoked against the prosecution.

**[85]** In a drug transaction, money ought to be given first to the seller before the drug could be handed over to the buyer but not in this case. Presumably, the money had already been passed over to the Malay man. This Malay man, the friend to the informer is actually not an informer. He was present at the grilled fish restaurant at Seberang Jaya and at the Sungai Dua Toll Plaza with the accused and the two agent provocateurs. He was also present at Jalan Mengkuang in Butterworth. Hence he should be called as a witness. The Supreme Court case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 was referred to. This Malay man was not even offered to the defence.

**[86]** The complainant of the case ASP Rosli Ismail (PW4) did not mention the discussion which took place between the accused and the agent provocateur (PW6) in his police report.

**[87]** The testimony of PW4 could not be relied upon by the court. It is hard to believe that out of the twenty one police personnel who took part in the operation, none of them could find from where the bag containing the drugs were obtained and from whom at Jalan Mengkuang, Butterworth.

**[88]** The evidence of the complainant PW4 contradicted himself. First, he said that after the accused was arrested, he examined the contents of the bag and brought the accused back to the police station. Second, after the arrest of the accused, he checked the contents of the bag and asked the accused 'Di mana beg itu di perolehi?'

**[89]** Actually the arrest of the accused was manipulated just to fulfill the arrest quota of the police.

**[90]** The identity of the compressed slabs is disputed because the chemist report, the police report and the search list contained discrepancies concerning the wrappers. The chemist report dated 17 August 2007 did not state that five slabs were wrapped in white papers whereas the search list and the police report both dated 28 June 2006 did mention the white papers. Furthermore, the chemist report mentioned plastic packages but the police report and the search list did not.

**[91]** These differences must be explained and referred to the case *Public Prosecutor v Lee Yau Ket* [2008] 4 MLJ 223; [2008] 1 LNS 172.

**[92]** The finger prints of the accused were not found on the exhibits. A finger print expert was not called as a witness as the investigating officer is not an expert in this field.

**[93]** The police report stated the estimated weight of all the compressed slabs to be 9,900g but the chemist found the total net weight of the ten compressed slabs of plant material is 9129g of cannabis.

**[94]** Therefore for the aforesaid reasons, the prosecution had failed to prove a prima facie case against the accused and his defence should not be called and he should be acquitted and discharged.

*Prosecution*

**[95]** The learned deputy public prosecutor argued that the evidence of PW4 could not be used to corroborate the evidence of PW6 by virtue of s 40A(1) of the Dangerous Drugs Act 1952. The evidence of an agent provocateur is admissible. The informer only introduced the accused to PW6. He did not participate in the discussion between the accused and PW6.

**[96]** PW6 himself took part in the operation and his evidence was not based on information. The second agent provocateur D/Cpl Basri bin Mat Nor was offered to the defence and s 114(g) of the Evidence Act 1950 does not apply.

**[97]** The Federal Court case of *Public Prosecutor v Mansor Md Rashid & Anor* [1997] 1 CLJ 233 does not define an informer and an agent provocateur. The informer in this case only played the role of an informer.

**[98]** The role of the Malay man was to help to drive the Kancil car as the informer was not good at driving. He also helped the informer to carry out the

operation. Section 40 of Act 234 protected him. The case of *Wan Yuriilhami bin Wan Yaakob lwn Pendakwa Raya dan satu lagi rayuan* [2009] 2 MLJ 383 was cited.

**[99]** A police report is not a substantive piece of evidence as seen from *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209.

**[100]** PW4 did ask the accused from where the bag containing the cannabis was taken but the accused could not give a satisfactory answer and he could not also show from which house or person that he took the bag. Hence the 21 members of the team could not do much.

**[101]** The identity of the exhibits is intact as the original markings are still on them. The chemist report is more detailed than the police report and the search list. The Court of Appeal case in *Gunalan a/I Ramachandran & 2 Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 1 LNS 318 was referred.

**[102]** The discussion which took place between PW6 and the accused regarding the selling price of the drug cannabis, the bag containing the slabs of cannabis held by the accused, the struggle between the accused and L/Cpl Mohd Basri (AP2) all this shows that the accused had custody and control and therefore possession of the drugs.

**[103]** When AP2 shouted 'Police!' the accused was seen to have released the incriminating bag from his hand and his subsequent struggle with the police only reflected his knowledge about the cannabis he was carrying.

**[104]** The accused was trafficking according to s 2 of Act 234 based on the direct evidence of PW6. He was selling the drugs.

**[105]** Summing up she said that the prosecution had proved a prima facie case against the accused and hence his defence ought to be called.

DECISION OF THE COURT

**[106]** At the close of the prosecution case, the court is guided by s 180(1) of the Criminal Procedure Code. Basically it has to focus on whether the prosecution had adduced credible evidence to prove the ingredients of the offence and the credibility of its witnesses.

**[107]** In the Court of Appeal case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 it held that the court must undertake a maximum evaluation of the prosecution evidence. 'If I decide to call upon the accused to

enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer was in the negative, then no prima facie case had been made out and the accused would be entitled to an acquittal'.

**[108]** In the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 it held that the standard of proof to be borne by the prosecution at the close of its case is to make out a prima facie case. 'The test at the close of the prosecution case is: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative, then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the prosecution case. If there is any such doubt there can be no prima facie case'.

**[109]** In the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, it held that the court must carry out a maximum evaluation of the evidence for the prosecution by assessing the credibility of its witnesses and making inferences admitted by the prosecution evidence. If its evidence admits two or more inferences, then the one favourable should be chosen for the accused.

POSSESSION

**[110]** The court finds that there was physical possession by direct evidence given by PW4, PW6 and L/Cpl Mohd Basri bin Mat Nor in that the accused was seen to carry the bag containing the ten compressed slabs of plant material along Jalan Mengkuang in Butterworth which the chemist analysed to be cannabis.

**[111]** At that particular moment, the accused was alone and no one else apart from the police was with him. The accused had custody, control and thus possession of the incriminating exhibits.

**[112]** When L/Cpl Mohd Basri shouted out that he and his fellow men were police, the accused dropped the bag which was not padlocked that he was carrying and put up a struggle with the lance corporal. The accused should have opened it to see the contents in view of the circumstances he was asked to deliver the bag, yet he wilfully did not to do so. The struggle was so fierce resulting in the accused, L/Cpl Mohd Basri and L/Cpl Roslan all of them falling into a drain.

**[113]** By resisting the arrest and putting up a struggle with the police, it only goes to show that the accused had knowledge of the cannabis he was supposed to sell to the agent provocateurs. Moreover, his discussion with PW6 on the

subject matter of cannabis also reflected his knowledge of the contents in the bag. Section 40A(1) of Act 234 provides for the admissibility of the evidence of PW6.

**[114]** The presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 arose as the amount of cannabis exceeded the statutory limit. Based on the facts of the case, the accused was in mens rea possession of the drugs in question as enunciated in the cited case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* which referred to *Toh Ah Loh & Mak Thim v Rex* [1949] MLJ 54 and *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158.

**[115]** The chemist had found that the ten compressed slabs of plant material were cannabis as defined in s 2 of the Dangerous Drugs Act 1952.

**[116]** The court finds that the identity of the exhibits intact as the original markings by PW4 and the investigating officer PW5 were still on the exhibits.

**[117]** PW4 had testified that inside the bag, there were a total of ten compressed slabs of plant material where five slabs were wrapped in aluminium foil and transparent sello tape (salotape lutsinar) respectively and the other five slabs were wrapped in white paper and transparent sello tape (salotape lutsinar).

**[118]** In the Federal Court case of *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141; [2010] 2 AMR 834, the Federal Court held that:

> The creditworthiness of an agent provocateur is enshrined in s 40A(1) of the DDA which provides a presumption on creditworthiness. This presumption is rebuttable. It falls upon the defence to adduce sufficient evidence for the court to conclude that the evidence of the agent provocateur is unworthy of credit.
>
> The evidence of an agent provocateur is however not that of an accomplice's and as such requires no corroboration.

**[119]** In this present case, the defence did not lead one iota of evidence to show to the court that PW6 was unworthy of credit apart from claiming that the arrest of the accused was merely to fulfill the arrest quota of the police.

**[120]** In *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 the Supreme Court held:

> In regard to the defence of the second appellant, the agent of the Drug Enforcement Administration was an *agent provocateur* and as such he is protected by the provisions of s 40A(1)and (2)of the Dangerous Drugs Act in that he is not presumed to be

unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person is admissible. Similarly any statement made to him by the accused person shall be admissible at the trial. There is therefore no requirement for the evidence of the *agent provocateur* to be corroborated.

**[121]** L/Cpl Mohd Basri, the other agent provocateur was not called as a witness because he did not play an active role in this sting operation like engaging in the negotiation for the purchase of the drug cannabis. Anyway he was made available for the defence but the accused did not call him.

**[122]** Therefore s 114(g) of the Evidence Act 1950 which provides for the withholding of evidence is not applicable. His presence in the case was made known to the accused.

**[123]** The question of whether money should have first being given to the seller in a drug transaction like this case is irrelevant because the payment of such money is not an ingredient of the offence.

**[124]** The presence of the Malay man at the grilled fish restaurant, the Sungai Dua Toll Plaza and at Jalan Mengkuang according to the evidence led by the prosecution was mainly to help the informer who was not competent in driving the Kancil car which carried the accused. In any event, he was also an informer himself and thus his identity is protected under s 40 of Act 234.

**[125]** The court is also of the view that both the registered informer and this Malay man, an informer too, had not lost their protection under s 40 of the Dangerous Drugs Act 1952.

**[126]** Both of them did not play an active and positive role in the operation which led to the arrest of the accused.

**[127]** They did not participate in the negotiation on the drug deal at the grilled fish restaurant and did not accompany the accused to get the incriminating bag when the latter walked into that particular lane and never at any material time did they handle the said bag.

**[128]** Therefore the contention of learned counsel that the Supreme Court case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 now applies for the failure of the prosecution to call this Malay man as a witness is baseless. He did not introduce the accused to the police thereby causing the latter to be arrested. It was the registered informer who had liaised with PW6 who put the accused in touch with the police.

**[129]** The court has no reason to doubt the credibility of the complainant of the case that is ASP Rosli bin Ismail (PW4) in response to the argument of the defence that he did not attempt to trace the source of the consignment of cannabis at Jalan Mengkuang on the spot after the arrest of the accused. PW4 had explained that the accused could not give a satisfactory answer to pertinent questions posed to him then and there.

**[130]** The court also views that PW4 did not make any contradictory evidence that affects the prosecution case in regard to the two purported versions in his evidence as contended by the defence.

**[131]** Judicial Proof (1957 September) MLJ XV:

> Absolute truth is beyond human perception. Conflicting version of an incident given by even honest and disinterested witness is a common human experience.
>
> This sceptism is not an attack on witness veracity so much as it is a recognition of human fallibility in observation, retention and recollection.

**[132]** What is of significance is that at that moment, the accused was already under arrest and no warning was administered to him before the accused made any statement. In any event, there is a general rule of evidence that an accused has a right in not answering any question that may incriminate him with the offence.

**[133]** The issue of the fingerprints is not fatal to the prosecution case as there is sufficient evidence on the identity of the accused as the drug trafficker and at all material time he was seen to be carrying the bag containing the cannabis.

**[134]** For the aforesaid reasons, the court finds that the prosecution succeeded in making out a prima facie case against the accused and called for his defence.

**[135]** The three options of remaining silent, giving evidence from the dock and from the witness stand were explained to the accused. He chose to give evidence from the witness box.

DEFENCE

**[136]** The accused gave evidence that on 27 June 2007 he was staying at Bedong, Sungei Petani, Kedah. On that day at about 12 midnight, he received a telephone call from a friend who later came to his house and invited him to go to Sungai Dua at Butterworth. His wife scolded him for going out so late at night but he told her that he would be home in an hour time.

**[137]** Before the telephone call from his friend, the same day that afternoon, he did not go out of his house to go anywhere. He and his friend, a Malay man called 'Panda' whom he had known for six years then left for Sungai Dua at Butterworth to meet a friend of Panda.

**[138]** On reaching Sungai Dua, Panda stopped the Kancil car that he was driving and went to talk with his friend. The accused got out of the car and stood beside it smoking a cigarette.

**[139]** After talking with his friend, Panda brought him to Mengkuang Road to meet another friend of his. The accused did not ask Panda on why he went there. Panda asked him to accompany him to meet his friend at Mengkuang Road. When they reached Mengkuang Road, Panda alighted from the car and walked towards a house known to be his friend's house. The accused was shown exh photograph 4A.

**[140]** The Kancil car driven by Panda stopped beside the electric post there. After the car stopped, the accused got out from the car and stood beside it while Panda walked towards a house and from his position, the accused could see the house.

**[141]** The house being located deep inside an area and Panda had to cross a small bridge over the drain there. From the place where he stood, the accused could not estimate how far the distance but he could still see the house. After talking to his friend, Panda carrying a bag, returned to where the accused was standing.

**[142]** Panda then put the travelling bag on the cement surface beside the mango tree (by looking at exh (photographs) P4A & B), and also beside the accused. After Panda put down the bag, he did not ask him the contents of the bag. Panda told the accused that he would drive the car to make a U-turn and that his other friend whom he met at Sungai Dua, Butterworth, would be coming to take the bag.

**[143]** Panda further asked the accused to give the bag to his friend from Sungai Dua who would be driving the car model Gen 2 when he arrived. When the car Gen 2 was coming, the accused was standing near the side of the road and the bag was next to him. When he took the bag, the car Gen 2 stopped beside the electric post after the Kancil car left the spot it had earlier stopped.

**[144]** After seeing the Gen 2 car, he took the bag and had just walked two feet to the front when he heard shouting 'Police!' and persons from this car pushed him into the drain. He did not do anything when he was being pushed

into the drain. While he was being pushed into the drain, the bag he was holding slipped from his hand and dropped onto the road. Later two police officers lifted him up from the drain.

**[145]** The police then accused him of being a drug trafficker. The accused explained to the police that it was Panda who asked him to give the bag to his friend who came from Sungai Dua by the Gen 2 car. At that time he did not know the whereabouts of Panda.

**[146]** After he was arrested, the police did not search the surrounding area where he was then standing.

**[147]** Subsequently the police took him back to Ibu Pejabat Daerah Police at Kepala Batas in Penang by the Gen 2 car. On the way to the Kepala Batas Police Station, one of the police personnel received a telephone call and the accused heard him answering 'Terima kasih, Panda'.

**[148]** After the accused had finished giving his evidence, the defence closed its case.

AT THE END OF THE DEFENCE CASE

*Submission — Accused*

**[149]** Learned defence counsel submitted that the complainant ASP Rosli bin Ismail (PW4) being an experienced officer had failed to jot down in his police report on the negotiation relating to the sale and purchase of the drug transaction that took place between the accused and the agent provocateur (PW6) at the grilled fish restaurant at Seberang Jaya in Penang. He argued that it is a vital point that the accused had agreed to sell the cannabis.

**[150]** He also failed to mention in the police report that the accused had tried to flee and struggled with the police when he became aware of their presence. PW4 agreed that this is an important point.

**[151]** He conceded that not everything must be noted down in a police report but such important points must be mentioned.

**[152]** Although there were altogether twenty one members of the police team in this operation yet no investigation was carried out at the scene where the accused was arrested.

**[153]** The prosecution evidence only shows that the arrest of the accused was a 'set-up' and the accused was used by the Narcotic Division Police to chalk up their number of arrests.

**[154]** The possibility could not be ruled out that the informer had been paid to secure the arrest of the accused. L/Cpl Mohd Basri the second agent provocateur was not called to corroborate the evidence of PW6 on the meeting between the accused and the PW6 at the grilled fish restaurant at Seberang Jaya.

**[155]** The testimony of PW4 during examination-in-chief contradicted the contents of his police report. In his police report, he did not state 'bungkusan' but in his testimony he mentioned so. The chemist report which was dated 17 August 2007 did not state white paper which was mentioned in the police report. PW4 confirmed this difference.

**[156]** In his reply, learned counsel pointed out that the prosecution did not reveal the name of the Malay man at the trial. The accused was only helping his friend Panda to carry the bag in order to hand it over to a friend of Panda.

**[157]** The prosecution did not prove how the folding was done in regard to the wrappers which included the white paper.

**[158]** Thus he concluded that the prosecution had failed to prove its case beyond reasonable doubt and the accused should be acquitted and discharged.

*Prosecution*

**[159]** PW4 did not note down the negotiation on the drug transaction between PW6 and the accused because he was not present when it transpired at the grilled fish restaurant.

**[160]** The struggle which happened between the accused and the police was not reported in the police report as held by the cited case of *Herchun Singh* that the first information report is not a substantive piece of evidence.

**[161]** The police did not frame the accused and the accusation of a 'set-up' is not true. The police would not use agent provocateurs in such an operation if they had no sufficient evidence.

**[162]** PW4 had explained on the question of white paper saying that the wrapper consisted of two layers, silver and white in colour depending on the way they were wrapped. There is no doubt in regard to the identity of the exhibits.

**[163]** The Malay man 'Panda' was never put to the prosecution witnesses and the defence being a bare denial could not say to have raised a reasonable doubt upon the prosecution case.

**[164]** The accused had adopted 'wilful blindness' by not looking at the contents inside the bag although he could have done so as the bag could be easily opened. Learned deputy prosecutor cited the Singapore case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424 which discussed the concept of wilful blindness.

**[165]** She also argued that the accused although did not know the person in the car Gen 2 yet he was willing to hand over the bag to him.

**[166]** Summing up, she contended that the prosecution had proved its case beyond reasonable doubt against the accused and the accused had failed to raise a reasonable doubt upon its case. Hence the accused should be found guilty and convicted of the offence.

THE COURT'S DECISION

**[167]** The core of the argument for the defence is that the accused was an innocent or passive carrier of the bag (exh P8) which contained the ten compressed slabs of cannabis. Learned defence counsel canvassed the idea that the operation which resulted in the arrest of the accused was scripted by the police from the Narcotic Department in order to chalk up their success rate in arresting drug traffickers.

**[168]** It was implicit in the contention of learned defence counsel that the accused was a mere pawn manipulated by the informer on the directive of the police to commit the offence.

*Issue*

**[169]** After evaluating the entire evidence of the whole case and taken into consideration the arguments of both learned deputy public prosecutor and defence counsel in relation to the facts of the case, the court finds that the issue is:

A Whether or not that the accused was an innocent or passive carrier helping his friend 'Panda' to carry the bag in order to hand it over to the latter's friend as a result of being purportedly manipulated by the informer and the police?

B **[170]** The court finds that the defence story had not cast a reasonable doubt on the prosecution case.

**[171]** The accused narrated that on 27 June 2007 after midnight, his friend 'Panda' a Malay man whom he had known for six years came to his house C inviting him to follow him to meet a friend of his (Panda) at Sungai Dua in Butterworth. Panda asked the accused to accompany him to meet his friend who was waiting for Panda at Sungai Dua. The accused did not know this friend of Panda.

D **[172]** The accused told Panda to send him home before 1am because his wife was not happy that he had to leave his house at that odd hour after midnight. Panda replied that he would finish his work first within fifteen minutes or half an hour.

E **[173]** Although the accused said that Panda told him on why he needed him to accompany him as he wanted to meet his (Panda) friend who was waiting at Sungai Dua in Butterworth yet the accused did not probe further on the purpose of the meeting. The accused also did not ask Panda on why he wanted F to go to Mengkuang Road to meet another friend of his.

**[174]** Regard to ordinary and normal human conduct, it is hard to believe that the accused, close to Panda, after having known him for six years, did not even bother to enquire from his friend the actual purpose of meeting Panda's G friends at Sungai Dua and Mengkuang Road at that wee hours. Why must Panda need the accused to accompany him merely to meet his friends? Surely common sense would have dictated to the accused, that there was more to it than met the eye. Any reasonable man in the shoes of the accused would have posed that question.

H **[175]** What is more, the accused had reminded Panda to send him home before 1am because his wife was not happy that he had to go out of the house in the early hours of that morning, thus it should have been more pressing for him to have asked Panda. Nevertheless, the accused lingered with Panda at I Sungai Dua, Juru Toll Plaza and Mengkuang Road.

**[176]** A noteworthy point is that why must Panda require his service only just to hand over the bag to his friend when Panda himself could have done it as the accused himself agreed during cross-examination. Why must Panda put

the accused through all the trouble just for such a purpose? It is not logical. As a sane and reasonable man, the accused ought to have sensed that something was not right yet he obeyed what Panda asked him to do. Why must Panda asked him to do it and Panda himself got into the Kancil car to make a U-turn?

**[177]** In consequence of such a reaction on his part, the court can only draw the conclusion that the accused all along knew what he was doing and this conclusion is fortified by the evidence of the agent provocateur that is PW6. The accused had engaged in discussion on the drug transaction and the court has no reason to doubt the credibility of PW6 that the accused was a drug trafficker of his own accord. The defence did not lead a shred of evidence to displace the presumption that PW6 was not worthy of credibility.

**[178]** The court is of the view that the accused was not an innocent carrier because prior to the commission of the offence at Mengkuang Road in Butterworth, the accused was with Panda for slightly over three hours which during that span of time he as a reasonable man ought to have sensed that Panda was not merely meeting his friends in the small hours of that morning in question for example to go for supper or to help his friend whose car had broken down in a desolate place but for a nefarious activity. He had plenty of time to back out but he chose to stay on because he was in reality the culprit trafficking in dangerous drug and being caught red handed, he now tried to blame his friend 'Panda' (if he existed).

**[179]** The court opines that a probable situation in which a person is an innocent or passive carrier is when on the spot he helps his purported close friend to carry or deliver the bag to another person which he does not enquire about the contents probably out of trust and respect for his friend's privacy when the latter due to circumstances beyond his control cannot do it, like suddenly rushing to see someone close to him who is involved in a serious road accident upon receiving an emergency telephone call or rushing to answer the call of nature.

**[180]** Another likely scene of an innocent carrier is when a long standing friend of his telephones him unexpectedly requesting him to deliver the incriminating exhibit immediately to another person because the friend of the innocent carrier is supposedly engaging in some urgent matter.

**[181]** The present case does not fit into such instances and the court finds that the story of the accused is not reasonable and logical in order to raise a reasonable doubt on the prosecution case.

**[182]** In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 67 (PC) the observations of Lord Diplock are relevant

to this case. His Lordship held that the mere act of moving controlled drugs does not of itself equate to trafficking but if the aim for which they were being moved (drawing an analogy here that is carrying/delivering) was to transfer possession from the mover/carrier to another person at the intended destination, the mover/carrier is guilty of the offence of trafficking.

**[183]** The accused also did not adduce one iota of evidence to show that Panda (assuming that he exists) possessed an ulterior motive to get him to be arrested but on the contrary, both of them are friends and knew each other for six years. In *Muthusamy v Public Prosecutor* [1946] MLJ 57, Taylor J 'A mere omission is hardly ever a discrepancy. The police statement (the police report to draw a parallel here) is usually much briefer than the evidence'.

**[184]** To recapitulate, the court finds that the accused had custody and control, and thus possession of the cannabis in question which exceeded the statutory permissible limit and that he had also knowledge of the drugs. The accused was also found to have trafficked in the drugs in this case and hence a prima facie case was established against him.

**[185]** For the foregoing reasons, the court finds that the accused had failed to raise a reasonable doubt upon the prosecution case and the prosecution had proved its case beyond reasonable doubt against the accused.

**[186]** The court then found the accused guilty of the offence and convicted him. The accused was then sentenced to death and in doing so it complied with s 277 of the Criminal Procedure Code.

*Accused convicted and sentenced to death.*

Reported by Kohila Nesan